PUBLIC PROSECUTOR

v.

PHON NAM

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR ACTING LP
MOHD. AZMI SCJ
EUSOFFE ABDOOLCADER SCJ
[CRIMINAL APPEAL NO. 66 OF 1986]
13 OCTOBER 1988

CRIMINAL LAW AND PROCEDURE: *Trafficking in dangerous drugs - Section 39B(1)(a) Dangerous Drugs Act 30/52 (Laws of Malaysia Act 234) punishable under s. 39B (2) - Chemist reports - Detective PC who served chemist reports on accused not called to give evidence - Accused endorsed both chemist reports to acknowledge receipt - At close of prosecution case DPP applied for leave to summon Detective PC after trial Judge pointed out gap - Defence objected - Judge refused application by DPP to invoke s. 425 CPC to summon Detective PC - Acquitted and discharged without calling for defence - Whether Judge acted rightly in declining to exercise discretion.*

This was an appeal by the Public Prosecutor against the decision of the High Court, Alor Setar on 1 January 1986 where the respondent was acquitted and discharged without his defence being called on a charge of trafficking in 128.80 grammes of heroin in contravention of s. 39B(1) (a) of the Dangerous Drugs Act No. 30/52 (Laws of Malaysia Act 234) and punishable under s. 39B(2) of the same Act. At the point when the prosecution closed its case the learned trial Judge drew the attention of the learned DPP that the DPC who served the chemist report on the respondent had not given evidence. The DPP then applied for leave under s. 425 of the CPC to summons the DPC. As the defence Counsel objected, the learned Judge after hearing arguments refused the DPP's application and acquitted and discharged the respondent without calling for defence.

The crucial question before the Supreme Court was whether the learned Judge acted rightly when he declined to exercise his powers.

Held:

[1] It is settled principle that on appeal an Appellate Court is slow to interfere with the exercise of a discretion by a Judge in the Court below, however it would do so where the Judge had not exercised the discretion judicially and in accordance with well known legal principles.

[2] However, in this case, there is some doubt that the Judge had properly considered the effect of s. 425 Criminal Procedure Code in particular the second limb of that section, being an imperative provision which requires the Court to exercise its discretion where the Court is satisfied that the evidence to be summoned would appear to the Court to be essential to a just decision of the case.

[3] In the circumstances, although the learned Judge rightly held that the power under s. 425 of the Criminal Procedure Code is discretionary, he however failed to exercise the discretion judicially.

[4] The appeal was allowed and the order of acquittal and discharge set aside and the case was ordered to be remitted back for the Court to invoke s. 425 of the Criminal Procedure Code.

[Appeal allowed. Order of acquittal and discharge set aside. Case remitted back for Court to invoke s. 425 CPC.]

Cases referred to:
Maxwell v. The Director of Public Prosecution [1935] AC 309
Ramli bin Kechik v. PP [1986] 2 MLJ 33; [1986] CLJ (Rep) 243
Mohd. Azam v. Mohd. Iqbal PLD 1984 Supreme Court 95

Legislation referred to:
Criminal Procedure Code, s. 425
Dangerous Drugs Act 1952, s. 39B (1)(a), (2)

For the public prosecutor - Su Geok Yiam, DPP
For the respondent - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT

Abdul Hamid Omar Acting LP:

This was an appeal by the Public Prosecutor against the decision of the learned Judge in the High Court at Alor Setar on 1 October 1986 where the respondent was acquitted and discharged without his defence being called. The respondent was tried for trafficking in 128.80 grammes of heroin (the drug) on 25 October 1983, in contravention of s. 39B(1) (a) of the Dangerous Drugs Act No. 30/52 (Laws of Malaysia Act 234) and punishable under s. 39B(2) of the same Act.

In the course of the trial the Investigating Officer testified that he received the drug together with other exhibits and personally sent them to the government chemist on 28 October 1983 and 4 April 1984 under seal. He received them back from the Chemistry Department together with two chemist reports (produced and marked as Exhibits P25 and P26) on 14 February 1984 and 7 May 1984. These reports were served on the respondent on 24 May 1984 pursuant to s. 399 of the Criminal Procedure Code by one Detective Police Constable 56729 Yunan. The respondent acknowledged receipt by endorsing on the reverse of P25 and P26. For some reason DPC Yunan was not called by the prosecution to testify nor was he offered to the defence at the close of the prosecution case. Nevertheless there was evidence to show that the respondent endorsed on the reverse of both P25 and P26 to acknowledge receipt.

At that point when the prosecution closed its case the learned Judge drew the learned Deputy Public Prosecutor's attention to the fact that DPC Yunan had not given evidence whereupon the Deputy Public Prosecutor applied for leave under s. 425 of the Criminal Procedure Code for the Court to summon DPC Yunan. The defence Counsel as a matter of course objected to the application. After hearing arguments the learned Judge upheld the defence objection, refused the application and acquitted and discharged the accused without calling for the defence. Hence the appeal.

For reasons that we shall state shortly the appeal was allowed and the order of acquittal and discharge set aside and the case was ordered to be remitted back for the Court to invoke s. 425 of the Criminal Procedure Code. We indicated that we would at a later date give reasons for our decision. We do now.

When the learned Deputy Public Prosecutor asked the Court to invoke s. 425 of the Criminal Procedure Code, he did concede that the omission to call the constable was an oversight on the part of the prosecution, but regardless he argued that it was a matter for the Court to exercise its discretion to call any person to be examined if it was essential to the just decision of a case.

The crucial question before us therefore was whether the learned Judge acted rightly when he declined to exercise his powers. Although he rightly held that the power under s. 425 of the Criminal Procedure Code is discretionary, he however failed to exercise the discretion judicially. He formed the view and we quote:

> Having regard to all the circumstances, including my view on the effect of our system of trial being adversarial, I did not think I should exercise my discretion by invoking s. 425 of the Criminal Procedure Code, I therefore declined to exercise it.

The learned Judge observed that the oversight on the part of the prosecution to call DPC Yunan had resulted in the prosecution's failure to prove the case. And he decided that he ought not to exercise his discretion under s. 425 Criminal Procedure Code in particular in view of what was said by Viscount Sankey, LC in *Maxwell v. The Director of Public Prosecution* [1935] AC 309 as follows:

> It must be remembered that the whole policy of English Criminal Law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury trying the true issue. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed ... It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

Our s. 425 of the Criminal Procedure Code clearly states and we quote:

> Any Court **may** at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court **shall** summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case. (Emphasis is mine).

Now this Court had on a previous occasion considered the effect of s. 425 of the Criminal Procedure Code. We refer to the case of *Ramli bin Kechik v. P.P.* [1986] CLJ (Rep) 243 where it was held that:

> By its very nature the discretion to be exercised under s. 425 Criminal Procedure Code depends on the facts of each case the main consideration being the essentiality of the additional evidence to a just decision of the case. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the Court would be justified in exercising its discretion in calling for additional evidence under this section ... The object of the section is just as much the prevention of escape of guilty person through some carelessness of the prosecution or the magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one party.

In the instant case the facts of the case did not justify the refusal by the learned Judge. In our view, he failed to appreciate that the evidence given by the Investigating Officer pertaining to the endorsements of receipt of service by the respondent and such endorsements on the reverse of Exhibits P25 and P26 were admissible in evidence. No challenge was in fact made by the defence Counsel that the service was not properly effected. Evidence by DPC Yunan would therefore be a mere formality to confirm the endorsements that the respondent had made on the reverse of Exhibits P25 and P26. The learned Judge clearly failed to appreciate this and consequently there was a failure to exercise the discretion properly.

We should state at this point that it is settled principle that on appeal an Appellate Court is slow to interfere with the exercise of a discretion by a Judge in the Court below, however it would do so where the Judge had not exercised the discretion judicially and in accordance with well known legal principles.

In the present case we had some doubt that the Judge had properly considered the effect of s. 425 Criminal Procedure Code in particular the second limb of that section.

Section 425 Criminal Procedure Code is clearly divided into two limbs, first: a discretionary provision which provides that the Court may, on an application, summon any person as a witness or recall and re-examine any person already examined at any stage of any inquiry, trial or other proceeding under the Code. In exercising the discretion under the first limb, the Court clearly must proceed with utmost circumspection especially when there was likelihood of the fresh evidence proving to be prejudicial to the accused. Second: an imperative provision which requires the Court to do so where the Court is satisfied that the evidence to be summoned would appear to the Court to be essential to a just decision of the case. (See *Mohd. Azam v. Mohd. Iqbal* PLD 1984 Supreme Court 95 with the corresponding section in the Pakistan Criminal Procedure Code.)

In this regard the Court is bound to admit fresh evidence when it appears essential to a just decision of a case. As the powers under this section are very wide it is therefore necessary that great care be taken when exercising such discretion. However, the second limb of this section being an imperative provision the Court must give serious consideration to exercising such powers if in so doing a just and proper decision could be arrived at.

It is for these reasons that we made the order that we did.

Also found at [1989] 1 CLJ 7